

NTSB Order No. EA-3733

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

v.

TIMOTHY THERON BOOHER,

Respondent.

The Administrator has filed an interlocutory appeal in accordance with the October 3, 1990 order of Administrative Law Judge William R. Mullins.¹ We have received no reply from respondent. We grant the appeal and dismiss respondent's appeal from the Administrator's order of revocation. We conclude that we lack jurisdiction to review or in any way condition the Administrator's exercise of his authority in this matter.

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Respondent does not contest that he pled guilty and was convicted of conspiracy to import a controlled substance, that respondent's action involved use of an aircraft, and that his actions violated 14 C.F.R. 61.15(a) and Section 609(c) of the Federal Aviation Act, 49 U.S.C. App. 1429(c). Respondent instead contends that, pursuant to §§ 1429(c)(5), he is entitled to Board review of the Administrator's failure to act on a request for waiver, allegedly properly made under that section.² The record includes a letter to the FAA from the Governor of Oklahoma stating:

This letter is to request that Timothy Booher's pilot license not be revoked. Mr. Booher is from a family that I know and respect. He has been gainfully employed as a pilot for Medi Flight for three years and has had no criminal record or public safety violations during the past three years. Any consideration that you give to my request will be greatly appreciated.

Respondent further contends that, because this request meets the terms of §§ 1429(c)(5), revocation should have been waived and the Board should reinstate his airman certificate.³

²Section 1429(c)(5) reads:

Waiver of revocation requirement

Upon request of a Federal or State law enforcement official, the Administrator may waive the requirements of paragraphs (1) and (2) that an airman certificate of any person be revoked if the Administrator determines that such waiver will facilitate law enforcement efforts.

A similar provision, headed "Special rule for law enforcement purposes" is found at §§ 1422(2)(B), applicable to reissuance of revoked certificates.

³Various other arguments are offered by both parties,

The Administrator claims that we lack jurisdiction to address any aspect of this matter. He argues that whether a waiver should be granted under (c)(5) is a matter committed entirely to his discretion, reviewable (if at all) only in the courts of appeals pursuant to 49 U.S.C. 1486. We agree with the Administrator's view of our jurisdiction.

We turn first for guidance to the statute itself. Subparagraphs (1) and (2) of § 1429 require the Administrator to revoke certificates under specified circumstances. Subparagraph (3) states that, prior to such revocation, the certificate holder is entitled to notice and a hearing before the Board. Standards for the Board's action are set forth, and the Board is authorized to affirm or reverse the Administrator's order. Subparagraph (5) contains no such language, thus initially suggesting that review was not intended, as it would have been simple to add a reference to review procedures.

The Administrator admits that he has found no legislative history addressing the question of first impression that is before us. Motion for Judgment on the Pleadings, at footnote 2.

Nevertheless, our conclusion is supported by an analysis of the purpose of subparagraph (5), when compared to the Board's role

(..continued)
including an argument from the Administrator that this letter from the Governor is not sufficient to invoke the provision because it does not address law enforcement matters, and an argument from respondent that the Governor's letter must be answered before the FAA may act to revoke. In light of our disposition, we need not address these subsidiary arguments.

regarding the enforcement docket. The Board undertakes to review the Administrator's prosecution and sanction activities generally under its authority to promote safety in air commerce and air transportation and the public interest. 49 U.S.C. 1429(a). It is well established, regardless, that certain actions by the Administrator are not subject to our review. A useful example for the case before us is the Administrator's exemption authority. As the Board stated in Administrator v. Worldwide Airlines, Inc., et al., 5 NTSB 1363, 1365 (1985), "exemption decisions are a form of individualized rulemaking . . . which the courts of appeals have exclusive authority to review." We see no substantive difference between an exemption granted and a waiver extended.⁴

Moreover, the Board has no policy role to play in adjudicating the enforcement docket of which this case is a part.

Just as the Board would not review the efficacy of a particular rule adopted by the FAA (Ewing, supra, at 1194) because doing so would involve policy choices, it should not be reviewing whether the Administrator properly (either procedurally or substantively) ruled on a request for waiver under (c)(5), a question that concerns the Administrator's prosecutorial function.

As the Administrator discusses, (c)(5) reflects the nation's

⁴See also Administrator v. Welch, 3 NTSB 2035, 2039 (1979) (the exemption process "is in the nature of a compromise negotiation"); and Administrator v. Ewing, 1 NTSB 1192, 1195 (1971).

fight against drugs and is intended to coordinate law enforcement efforts in this regard. The Board's role is elsewhere -- we address matters of air safety -- and, in our opinion, our jurisdiction is not invoked by the Administrator's decision to deny (explicitly or by failure to act) a request that revocation be waived to facilitate those law enforcement efforts.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's interlocutory appeal is granted; and
2. Respondent's appeal from the Administrator's order of revocation is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.